NO. 41682-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JEFFREY R. MCKEE,

Petitioner - Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Appellant, Jeffrey McKee, alleges violations of the Public Records Act (PRA) that occurred three and one half years ago, during his incarceration at Corrections Corporation of America (CCA)/Florence Corrections Center (FCC) while under the custody of the Washington State Department of Corrections (Department or DOC). Mr. McKee now attempts to bring this action in spite of the bar imposed by the statute of limitations pursuant to RCW 42.56.550. Interestingly, Mr. McKee's complaint, and the evidence presented to the trial court, demonstrates conclusively that Mr. McKee knew or should have known he had a cause of action in December 2006. The responsive documents in question included communication Mr. McKee himself created at the time, and CCA/FCC's response to that request.

II. RESTATEMENT OF THE CASE

A. Substantive Facts

On November 24, 2006, Mr. McKee[1] wrote a letter to Lyn Francis, the Department's public disclosure coordinator, requesting all documents related to his November 21, 2006, pod restriction while housed at CCA/FCC. CP ___, Sub No. 5, Complaint, Ex. 1. On November 29,

[1] At the time Mr. McKee was an inmate of the Washington State Department of Corrections at a facility ran by the Corrections Corporation of America (CCA) Florence Corrections Center (FCC). CP ___, Sub No. 5, Complaint, Attachment A, Affidavit of Jeffrey McKee.

2006, Mr. McKee wrote a similar request to James C. Miller, the Department's on-site contract monitor. *Id.* at 2, sec. 2.3 and Ex. 4. In part, the letter requested records from Mr. McKee being placed on pod restriction. *Id.*, Ex. 4. The letter also specified the type of records Mr. McKee was seeking, including log books and infraction reports. *Id.* On December 5, 2006, Ms. Francis responded to Mr. McKee's first letter indicating that it would require another ten days to respond to Mr. McKee's request. *Id.*, Ex. 2. Then on December 7, 2006, Ms. Francis responded to Mr. McKee's letter to Mr. Miller indicating that she had already responded to his request. *Id.*, Ex. 6.

At some period, prior to December 18, 2006, Mr. McKee sent a kite to CCA/FCC regarding any infraction reports regarding Mr. McKee's pod restriction. *Id.*, Ex. 8. CCA/FCC responded to Mr. McKee's kite informing him that there was no infraction report related to his pod restriction. *Id.*

On December 18, 2006, Mr. Miller informed Ms. Francis that the Department did not possess the records Mr. McKee sought. *Id.* Mr. Miller also informed Ms. Francis that CCA/FCC had generated a response to a kite from Mr. McKee and a log book that talks about pod restrictions. *Id.* CCA/FCC did not possess an infraction report related to Mr. McKee's request.

On December 26, 2006, Ms. Francis informed Mr. McKee that there was no infraction related to Mr. McKee's placement in pod restriction, that the Department was not in possession of any documents responsive to his request, and that Mr. McKee needed to contact CCA/FCC for any documents related to his request. *Id.*, Ex. 3.

B. Procedural Facts

The Department is satisfied that Mr. McKee has accurately and adequately set forth the procedural history of this case in his opening brief, except for two points. First, Mr. McKee completely omits that DOC argued in its briefing and oral argument that if the one year statute of limitation did not apply in this matter, then two-year catch-all would apply. *See* Opening Brief, p. 13-16, *but contra* CP 10; RP., p. 7-8. Second, Mr. McKee mischaracterizes the record regarding Counsel's objection. *See* Opening Brief, p. 15. Mr. McKee omits the sentence which actually served as the basis for the objection; where he attempted to insert hearsay and an unsupported statement which was not part of the record. *See* RP., p. 11-21.

III. STANDARD OF REVIEW

Judicial review of all agency actions under the PRA is *de novo*. RCW 42.56.550(3). Appellate review of a trial court ruling under Civil

Rule (CR) 12(b)(6) is *de novo*. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007). Dismissal under CR 12(b)(6) is appropriate where it appears beyond a reasonable doubt that no facts exist that would justify recovery, even while accepting as true the allegations contained in the plaintiff's complaint. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). A motion to dismiss questions only the legal sufficiency of the allegations in a pleading. *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 742, 565 P.2d 1173 (1977); *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 298, 545 P.2d 13 (1975). "The only issue before the trial judge is whether it can be said there is no state of facts which plaintiff could have proven entitling him to relief under his claim." *Contreras*, 88 Wn.2d at 742; *Barnum v. State*, 72 Wn.2d 928, 929, 435 P.2d 678 (1967).

IV. ARGUMENT

A. Mr. McKee's Claim Is Barred By The Statute Of Limitations

1. The Superior Court Properly Applied RCW 42.56.550(6) In Determining That Mr. McKee's Claim Was Barred By The One Year Statue of Limitations

The PRA requires Mr. McKee to file any action within one year of the date of an agency's "claim of exemption or last production of a record on a partial or installment basis." RCW 42.56.550(6). As a statute of limitations, RCW 42.56.550(6) acts to eliminate Mr. McKee's right to

bring a cause of action, as it relates to specific records requests, beyond the time period specified within the statute.

Washington courts have long held that statutes of limitations begin to run against a cause of action on the date the plaintiff first becomes entitled to seek relief in the courts. *E.g., Jones v. Jacobsen*, 45 Wn.2d 265, 269, 273 P.2d 979 (1954); *Huff v. Roach*, 125 Wn. App. 724, 729, 106 P.3d 268 (2005). Both the United States Supreme Court and the Washington Supreme Court recognize that statutes of limitations are intended to provide finality. *Reading Co. v. Koons*, 271 U.S. 58, 63, 46 S. Ct. 405, 70 L. Ed. 835 (1926); *Atchison*, 161 Wn.2d at 382. *See also Janicki Logging & Construction Co. v. Schwabe, Williamson & Wyatt*, 109 Wn. App. 655, 662, 37 P.3d 309 (2001). The "obvious" purpose of such statutes is to set a definite limitation upon the time available to bring an action, without consideration of the otherwise underlying merit. *Dodson v. Continental Can Co.*, 159 Wash. 589, 596, 294 P. 265 (1930) (quoting *Reading Co.*, 271 U.S. 58); *see also Atchison*, 161 Wn.2d at 382. Statutes of limitations exist "to shield defendants and the judicial system from stale claims;" plaintiffs are not permitted to "sleep on their rights" because of the risk that "evidence may be lost and witnesses' memories may fade." *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997).

Statutes of limitations are strictly applied, and courts are reluctant to find an exception unless one is clearly articulated by the Legislature. *E.g., Huff*, 125 Wn. App. at 732; *Bennett v. Dalton*, 120 Wn. App. 74, 85-86, 84 P.2d 265 (2004); *Janicki*, 109 Wn. App. at 662. Washington courts have also consistently rejected interpretations that would allow a party to manipulate the date an action accrues or the tolling of a statute of limitations. *E.g., Atchison*, 161 Wn.2d at 381-82 (choice of personal representative should not be allowed to govern accrual of wrongful death action); *Huff*, 125 Wn. App. at 732 (rejecting an interpretation that would allow manipulation of accrual of legal malpractice claims). This is particularly true in cases governed by explicit statutory directives such as the PRA and not by the common law. *See Elliott v. Dep't of Labor and Indus.*, 151 Wn. App. 442, 447, 213 P.3d 44 (2009) (declining to apply the discovery rule to modify the accrual date of an industrial insurance claim where the plain language of the statute specified that a claim had to be brought within one year of the injury/accident).

In the present case, it is undisputed that on December 26, 2006, Mr. McKee was informed by DOC that they did not posses the records he was seeking. Consequently, Mr. McKee's claim accrued on December 26, 2006, when the DOC denied possessing any records. As such, the statute of limitations expired on December 26, 2007, more than two and a half

years before this lawsuit was filed. Mr. McKee's claims are time-barred and must be dismissed as a matter of law.

Mr. McKee asserts that the holding of *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009), is controlling as to the facts of his case. However, his reliance is misplaced. *Rental Housing* dealt with the sufficiency of the content of an exemption log for the purpose of determining when the statute of limitations begins to run in a public records case. *Id.* at 541. Such facts do not apply in the case at hand, as there was no exemption log provided as there were no records that were produced. More importantly, *Rental Housing Ass'n* did not address the issue before this Court, namely, whether an agency triggers RCW 42.56.550(6) when it provides notice to the requestor that there are no responsive records to be produced. Thus, *Rental Housing* is inapposite, and does not apply here.

Nor is this Court bound by Division I of the Court of Appeals' recent decision in *Tobin v. Worden*, 156 Wn. App. 507, 233 P.3d 906 (2010). There, Division I held that production of a single record that was the entirety of a records request did not trigger the one-year statute of limitations set out in RCW 42.56.550(6). *Id.* at 513. Stating that it must give effect to the plain meaning of the provision "as an expression of legislative intent," Division I held that the one-year statute of limitations

can only be "triggered by one of two occurrences: (1) the agency's claim of an exemption or (2) the agency's last production of a record on a partial or installment basis." *Id.* Consequently, Division I reasoned that an agency's production of "a single document that is the entirety of the requested record" does not trigger the statute of limitations. *Id.* at 514. However, Division I's reading of RCW 42.56.550(6) renders the statute of limitations a nullity if an agency responds to a public records request by producing all responsive records in their entirety at one time. This nonsensical result cannot have been what the Legislature intended when it amended RCW 42.56.550(6) to shorten the limitations period from five years to one year.

In 2005, the Legislature amended RCW 42.56.550(6) for the purpose of shortening the limitations period for actions brought under the PRA to one year. *Tobin,* at 512, *citing* RCW 42.56.550(6) (2005) (amended by Laws of 2005, ch. 483, § 5). In *Tobin*, Division I essentially concluded that the Legislature, in so doing, also intended to eliminate the statute of limitations entirely for situations in which an agency responded to a public disclosure request by providing the sole record responsive to the request, without redacting or claiming any exemptions or stated that no responsive documents existed. Such a result is absurd. The Legislature

clearly did not intend for this result when it reduced the statute of limitations from five years to one.

To conclude otherwise would yield unreasonable, illogical, and absurd consequences.[2] Primary among these consequences is the impossibility of agencies being able to defend stale - or even ancient - claims. An agency has the burden of proof to establish its compliance with the PRA, no matter how stale or ancient the claim. RCW 42.56.550(1), (2). However, public agencies do not retain all of their records indefinitely; they are authorized to destroy records that have reached the end of their designated retention period. *See generally* RCW 40.14. The reasoning of *Tobin* effectively nullifies retention schedules adopted under RCW 40.14, since any agency that failed to permanently retain all public records would be unable to defend itself against a claim filed years later alleging that not all records were properly located, assembled, and provided. This interpretation of RCW 42.56.550(6) would permit a requestor who either receives a single, ostensibly final production of records, or is told that no records exist, to sue years, if not decades later, on an allegation that not all records were located, assembled and

[2] Courts must construe statutes to avoid "unlikely, strange or absurd consequences." *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994); *see also Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986) (courts should avoid statutory interpretations that "would render an unreasonable and illogical consequence").

provided.[3] The untenable consequence of that interpretation is not that agencies complying in good faith with RCW 40.14 would lose these suits, but that they would be unable to even attempt a defense. This Court recently found that the notion that the Legislature intended to have no statute of limitations apply in a situation that did not neatly fit under RCW 42.56.550(6) as being absurd. *See Johnson v. State Dept. of Corrections*, 164 Wn. App. 769, 777, 265 P.3d 216 (2011). Therefore, it would be appropriate for this Court to find that Mr. McKee's action was barred by the one-year statute of limitations, and uphold the trial court's dismissal.

2. If RCW 42.56.550(6) Is Silent As To A Denial Of Records, Then The Catch-All Two Year Statute Of Limitations Applies To Bar Mr. McKee's Claim

Contrary to Division I's conclusion in *Tobin*, at most RCW 42.56.550(6) could be read as silent on the length of the limitation to bring an action when an agency produces a single responsive record or informs the requestor there are no responsive documents. The clear legislative intent to shorten the limitations period for PRA actions generally to one year is inconsistent with an intent to leave the door open for an undefined period when an agency produces a single responsive record. As such, RCW 42.56.550(6) could be viewed as simply setting the parameters for

[3] RCW 42.56.100 precludes an agency from destroying a record, in compliance with the applicable retention schedule, until a public record request is "resolved." Without a statute of limitations, a public records request can never be "resolved."

when the one-year statue of limitations applies, and remaining silent as to other situations.

Applying this approach, this Court would be without guidance as to the proper statute of limitations and could therefore look more broadly at statutory solutions to find the applicable statue of limitations. RCW 4.16 provides different statutes of limitations for different causes of actions. In RCW 4.16.130, the Legislature provided a catch-all limitation: "[a]n action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued." RCW 4.16.130.

Although DOC raised this alternative two-year statute of limitations in its motion to dismiss, Mr. McKee failed to address it at any stage of this case. *See* CP 17-20; RP., p. 3-15.

This Court has recently recognized the possible applicability of the two-year statue of limitations. In *Johnson*, this Court began to address the quandary caused by the language contained in RCW 42.56.550(6). *See Johnson*, 164 Wn. App. at 778 n. 14. Much as the situation in *Johnson*, the statute is silent on a situation such as this where there is a denial of records based on an agency stating that they do not possess the records. As this Court noted, the Legislature has provided no other PRA-specific statutes of limitations, "leaving only the non-PRA-specific general RCW

4.16.130 to apply to PRA record productions that do not fall within the specific categories included in RCW 42.56.550(6)." *Id.* If the Court applied the two-year statute of limitations found in RCW 4.16.130, this claim would have been time-barred after December 26, 2008. Like *Johnson*, Mr. McKee did not file his action before expiration of either statute of limitations, and therefore, this Court can dismiss Mr. McKee's action under either statute of limitations.

3. Even If The Three-Year Statute Of Limitations Were To Apply, Mr. McKee's Claims Would Still Be Time Barred

For the first time on appeal, Mr. McKee argues that the three-year statute of limitations under RCW 4.16.080 applies to matters brought under the PRA. First, as this is a new argument brought on appeal, it is improperly raised and should not be considered. *See* RAP 2.5. However, even if the Court was to consider Mr. McKee's argument, it would still have to be rejected. RCW 4.16.080 is the statute of limitations for personal injury actions. *See Loeffelholz v. University of Washington*, 162 Wn. App. 360, 366, 253 P.3d 483 (2011) (three year statute of limitations for personal injury); *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn. App. 176, 190, 222 P.3d 119 (2009) (an action for injury to the person of another under RCW 4.16.080 shall be commenced within three years); *Young v. Estate of Snell*, 134 Wn.2d 267, 948 P.2d 1291 (1997). In his

argument, Mr. McKee fails to provide any authority that matters brought against a state agency under the PRA are either a personal injury action, or that the Legislatures ever intended for it to be construed as such. Additionally, even if this Court was to apply the three-year statute of limitations, Mr. McKee's action would still be barred. Under the three-year stature of limitations, Mr. McKee's statute of limitations would have expired on December 26, 2009. This is prior to his filing of this action. Even under this most permissive statute of limitations cited by Mr. McKee, his action would still be barred. Therefore, dismissal of Mr. McKee's case was proper, and the trial court's order should be upheld.

B. The Discovery Rule Does Not Apply To A Cause Of Action Under The Public Records Act

The clear statutory language of RCW 42.56.550(6) defines precisely when a cause of action accrues under the PRA and the time within which a claim must be filed. For some causes of action the Legislature has directed that the statute of limitations may be subject to the discovery rule[4], under which a cause of action accrues when the plaintiff knew or should have known enough facts existed to support a right to sue. However, the discovery rule does not apply in every case. *See, e.g., O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 72, 947 P.2d 1252 (1997).

[4] *See, e.g., McLeod v. Northwest Alloys, Inc.*, 90 Wn. App. 30, 35, 969 P.2d 1066 (1998) (discussing the Uniform Trade Secrets Act); RCW 4.16.350(3) (medical negligence); and RCW 4.16.080 (6) (official misappropriation of funds).

Indeed, if it intended for the rule to apply, the Legislature could have codified it in the PRA in 2005 when it amended the statute of limitations to one year, or even in 2011, when it made various legislative changes to the PRA, but it chose not to. Rather, the Legislature provided a precise trigger in RCW 42.56.550(6), which is manifestly clear to the public, agencies, and the courts. The statute of limitations begins to run when the agency claims an exemption or the last production of a record.

The purpose of the PRA is to provide a mechanism by which citizens can obtain information about the functions of government. The penalty and cost provisions in RCW 42.56.550(4) provide a significant incentive to agencies to comply with the very strict requirements of the PRA. The one-year statute of limitations in RCW 42.56.550(6) ensures that actions are filed timely to serve the goal of prompt public disclosure without resulting in disproportionate individual financial gain at the expense of other citizen taxpayers. In addition, unlike many statutes of limitations that act to prevent a potential litigant from all access to relief, the PRA does not preclude requestors from what they ultimately seek – disclosure of records. A requestor can always make a new request for records he believes were not included in the response to his original request. Requiring requestors to file a claim for penalties and costs within one year of production simply prevents a requestor from holding back and

seeking higher penalties and provides finality and certainty for agencies and the taxpayers regarding liability for potential penalties and costs. Despite being barred from enriching himself at the taxpayers' expense, a requestor with a time-barred claim is still not deprived of an opportunity to access public records.

Just as the PRA mandates that agencies comply with its strict procedural requirements or be subject to daily penalties and costs, so too does the PRA limit a plaintiff's right to obtain such penalties and costs. Neither Mr. McKee, nor any requestor, is denied the right to access public records through application of the statute of limitations. Rather, only the statutory claim for penalties and costs is legislatively extinguished by intent and design.

The Legislature has carefully and purposefully limited the statutory cause of action for penalties and costs for good policy reasons. Agencies are staffed with human beings charged with exercising their best efforts in complying with the strict procedural requirements of the PRA. These human beings are not machines who can guarantee that all employees in a large agency have been contacted, that all hard files have been perfectly and meticulously hand searched, and that all theoretically relevant keyword searches have been conducted for electronic records. It is conceivable that some records might be overlooked or accidentally left out

of a response. Recognizing the inherent fallibility in any such human endeavor, the Legislature imposed strict procedural requirements and daily penalties for noncompliance, but also decided to specifically define by when a statutorily created cause of action for penalties and costs may be brought.

To discard the Legislature's directive, as Mr. McKee suggests, would subject agencies to stale claims that are many years old. The Legislature did not intend the taxpayers to enrich resourceful requestors who may compare notes years after receiving responses, or a requestor who makes follow-up requests years after an initial request and discovers that some responsive documents were not provided. Conceivably, application of the discovery rule would permit a requestor to postpone inspection or receipt past the one-year statute of limitations and then bring a stale action if he believes the response was insufficient. These scenarios would result in extremely stale actions being prosecuted for huge financial windfalls to the detriment of the taxpayers and contrary to the PRA's express purpose of promoting prompt disclosure and, if necessary, prompt judicial review.

In sum, Washington courts have strictly applied statutes of limitations in order to comply with the legislative purpose of promoting finality. RCW 42.56.550(6) explicitly states the circumstances for claim

accrual under the PRA. Exceptions and mechanisms for manipulating accrual or tolling are disfavored. Where the discovery rule is not mandated by statute and the Legislature had defined specifically when the statute of limitations begins to run, the statutory language should not be judicially amended. Despite his contentions, the statute of limitations began to run on Mr. McKee's claim on December 26, 2006, not August 2009. Therefore, Mr. McKee's cause of action fails and must be dismissed.

1. Even If The Court Was Inclined To Apply The Discovery Rule, It Would Be Inappropriate To Do So In This Case As Mr. McKee Was Aware Of The Facts Necessary To Establish A Legal Claim

The trial court properly rejected Mr. McKee's discovery rule argument as Mr. McKee was aware of the facts necessary to establish a legal claim on December 26, 2006. The discovery rule operates to "toll the date of accrual until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim." *Crisman*, 85 Wn. App. at 20, (citing *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992)). The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. *Allen*, 118 Wn.2d at 758. Thus, the "action accrues when the plaintiff

knows or should know the relevant facts whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action." *Id.*

In this matter, even if the Court was inclined to apply the discovery rule in a case brought under the PRA, it would be improper to do so in this matter as Mr. McKee was aware as far back as December, 26, 2006, of the facts necessary to establish a legal claim. Mr. McKee wrote a letter on November 24, 2006, asking for records related to his pod restriction that occurred on November 21, 2006. *See* CP ___, Sub No. 5, Complaint, Ex. 1. On November 29, 2006, Mr. McKee wrote another letter, asking for records from the same pod restriction, specifying the type of records he was seeking, including log books and infraction reports. *Id.*, Ex. 4. DOC responded to Mr. McKee's request that they would search for any documents. Then on December 18, 2006, Ms. Francis was informed that CCA/FCC had responded to a kite from Mr. McKee and had a log book. *Id.,* Ex. 8. Ms. Francis was also informed that CCA/FCC did not have an infraction related to documents. *Id.*

Finally, on December 26, 2006, Mr. McKee was informed by DOC that there was no known infraction related to the incident. *Id.*, Ex. 3. Mr. McKee was also informed that DOC did not possess any responsive records and was also told that for any other documents he needed to contact CCA/FCC. *Id.* Among the documents Mr. McKee now claims he

was improperly denied a kite that he himself wrote prior to December 26, 2006 (which elicited a response from CCA/FCC). As he is the one who created them, Mr. McKee knew or should have known that there were records responsive to his request. If Mr. McKee believed that DOC had an obligation to retrieve records from CCA/FCC, he was presented with the information necessary to pursue an action on December 26, 2006. However, rather than file a complaint, for reasons unknown, Mr. McKee chose to wait for over two and a half years.

In his appellate brief, Mr. McKee argues that when he was told that DOC did not have records, "a requester typically has little reason to suspect that the unidentified records exist." Opening Brief, p. 32. This argument fails for two reasons. First, this situation was not "typical," and as noted *supra* the query is into when the plaintiff knew the facts underlying the claim, not when the typical requestor might know. Mr. McKee was told that DOC did not generate any of the documents Mr. McKee sought, and that he would need to seek them from CCA/FCC. At that point, if Mr. McKee felt that DOC was wrong (especially knowing he had in fact written a kite regarding the issue he was seeking record on), and had the duty or obligation to get the documents, he had the necessary knowledge to seek legal challenge at that point.

Second, the "discovery" of the December 18, 2006, email by Mr. McKee did not provide Mr. McKee with anymore information then he had on December 26, 2006. Mr. McKee was told there was no paperwork generated by DOC, that DOC did not possess the paperwork, and that he would need to contact CCA/FCC. *See* CP ___, Sub No. 5, Complaint, Ex. 3. At the time, the documents possessed by CCA/FCC included a kite from Mr. McKee and a response to that kite. *Id.*, Ex. 8. Mr. McKee knew the existence of those documents. In his response brief at the trial court, Mr. McKee provided the self serving statement outside of the complaint that he did not recall sending the kite and that in his experience CCA/FCC disregarded kites and did not respond to them. *See* CP 21; RP., 11:11. This only furthers supports the fact that the discovery rule should not be applied in this case. First, Mr. McKee does not deny that he sent a kite or that he received a response to the kite. Rather, he simply states that he does not remember sending the kite. The discovery rule is based on whether a plaintiff knew or should have known about the facts that underlie his cause of action and not on his memory of what he wrote or the responses he read. However, Mr. McKee's own evidence, i.e. the December 18, 2006, email, contradicted his own self serving statement that CCA/FCC would throw away kites and not respond to them. Therefore, the trial court properly rejected Mr. McKee's argument that the

discovery rule should have applied, as this Court should as well. Therefore, Mr. McKee's action should be dismissed as time-barred and the trial court's order of dismissal affirmed.

C. The Trial Court Did Not Err In Granting DOC's Motion To Dismiss Before Mr. McKee Could Conduct Discovery

The court has broad discretionary powers to control discovery. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 233, 654 P.2d 673 (1982). Upon showing of good cause, the court may deny or limit discovery. CR 26(c). A court's determination on a motion to stay proceedings or grant a protective order is discretionary, and is reviewed only for abuse of discretion. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 348, 16 P.3d 45 (2000). A trial court abuses its discretion only if its ruling is manifestly unreasonable or is based upon untenable grounds or reasons. *Id.* Whether a court abuses its discretion in controlling discovery depends on the interests affected and the reasons for and against the decision. *Id.*

The abuse of discretion standard recognizes that deference is owed to the trial court because it is "'better positioned than [the appellate court] to decide the issue in question.'" *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403, 110 S. Ct. 2447, 2459 L. Ed. 2d 359 (1990)). Here, the DOC asserted that McKee's

complaint was deficient as a matter of law in that it was filed after the statute of limitations expired. No amount of discovery could resolve this fundamental defect. Therefore, factual discovery would have posed an unnecessary burden on the Department while the court decided the merits of the legal arguments regarding the statute of limitations issue. Nor, did Mr. McKee ever file a motion to compel. Mr. McKee simply sought to have discovery "not be delayed any further" and sought that discovery be produced within 10 days of the hearing regarding dismissal. CR 23. However, as the trial court dismissed the complaint upon a matter of law, no further action regarding discovery was necessary. Therefore, the court did not abuse its discretion in by granting the Department's motion to dismiss before Mr. McKee could conduct discovery in the matter.

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V. CONCLUSION

For all of the foregoing reasons, the Department respectfully requests that this Court affirm the superior court's dismissal of Mr. McKee's PRA Complaint.

RESPECTFULLY SUBMITTED this 7th day of March, 2012.

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CERTIFICATE OF SERVICE

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EXECUTED this 7th day of March, 2012, at Olympia, Washington.

s/ Tera Linford
TERA LINFORD
Legal Assistant

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